

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JERMEAL WHITE,

Plaintiff,

vs.

R. ERDOS, et al.,

Defendants.

Case No. 1:19-cv-470

Barrett, J.
Litkovitz, M.J.

**ORDER AND REPORT
AND RECOMMENDATION**

Plaintiff, an inmate at the Southern Ohio Correctional Facility (SOCF), brings this action under 42 U.S.C. § 1983 against defendants Warden R. Erdos and Correctional Officers C. Duckworth and David Dunlap. By separate Order issued this date, plaintiff has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. This matter is before the Court for a *sua sponte* review of the complaint to determine whether the complaint, or any portion of it, should be dismissed because it is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. *See* Prison Litigation Reform Act of 1995 § 804, 28 U.S.C. § 1915(e)(2)(B); § 805, 28 U.S.C. § 1915A(b).

In enacting the original *in forma pauperis* statute, Congress recognized that a “litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To prevent such abusive litigation, Congress has authorized federal courts to dismiss an *in forma pauperis* complaint if they are satisfied that the action is frivolous or malicious. *Id.*; *see also* 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). A complaint may be dismissed as frivolous when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke v.*

Williams, 490 U.S. 319, 328-29 (1989); *see also Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). An action has no arguable legal basis when the defendant is immune from suit or when plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or “wholly incredible.” *Denton*, 504 U.S. at 32; *Lawler*, 898 F.2d at 1199. The Court need not accept as true factual allegations that are “fantastic or delusional” in reviewing a complaint for frivolousness. *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Neitzke*, 490 U.S. at 328).

Congress also has authorized the *sua sponte* dismissal of complaints that fail to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915 (e)(2)(B)(ii) and 1915A(b)(1). A complaint filed by a *pro se* plaintiff must be “liberally construed” and “held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). By the same token, however, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hill*, 630 F.3d at 470-71 (“dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim” under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true, but need not “accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286

(1986)). Although a complaint need not contain “detailed factual allegations,” it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557. The complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson*, 551 U.S. at 93 (citations omitted).

In the complaint, plaintiff alleges that defendant Duckworth “told a crazy lie on [him]” on April 26, 2019. (Doc. 1, Complaint at PageID 3). Plaintiff claims that Duckworth wrote a false conduct report against him which was subsequently withdrawn.

Plaintiff further alleges that defendant Dunlap used excessive force against him for no reason. According to plaintiff, Dunlap bent his wrist so hard it popped out of socket, threw him against the hallway wall, and hit his head against “the cage.” (*Id.* at PageID 2–3). Plaintiff claims he was not provided medical treatment for his injuries and was subsequently on hunger watch. He further claims that he has written the chief inspector regarding his concerns, but not received a response.¹

For relief, plaintiff seeks monetary damages. (*Id.* at PageID 6).

At this stage in the proceedings, without the benefit of briefing by the parties to this action, the undersigned concludes that plaintiff may proceed with his Eighth Amendment excessive force claim against defendant Dunlap. Plaintiff’s remaining claims should be

¹ Plaintiff has not alleged that any named defendant denied him medical treatment or named the chief inspector as a defendant to this action.

dismissed. See 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

Plaintiff's claims against Warden Erdos should be dismissed. Plaintiff does not include any factual allegations or claims against this defendant. (See Doc. 1, Complaint at PageID 6). Plaintiff's sole mention of Erdos in the complaint is that he is responsible for the operation of the prison and the welfare of all inmates. (*Id.* at PageID 2). Plaintiff's claims rest on a theory of *respondeat superior*, which does not apply to § 1983 claims and may not serve as a basis for liability. See *Iqbal*, 556 U.S. at 676; *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978); *Hill v. Marshall*, 962 F.2d 1209, 1213 (6th Cir. 1992). “[Section] 1983 liability of supervisory personnel must be based on more than the right to control employees.” *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Section 1983 liability is premised on active unconstitutional behavior and not a mere failure to act. *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). The mere fact that Erdos is the warden at SOCF is not enough to impose liability on him under section 1983. Therefore, plaintiff's claims against defendant Erdos should be dismissed.

Defendant Duckworth should also be dismissed as a defendant to this action. Plaintiff alleges that Duckworth wrote a false conduct report against him. Without any factual elaboration, plaintiff claims that this was done in retaliation. (See Doc. 1, Complaint at PageID 3, 6). First, plaintiff has not stated a constitutional claim based on his allegation that Duckworth wrote a false conduct report against him. Erroneous or even fabricated allegations of misconduct by an inmate, standing alone, do not constitute a deprivation of a constitutional right. See, e.g., *Reeves v. Mohr*, No. 4:11cv2062, 2012 WL 275166, at *2 (N.D. Ohio Jan. 31, 2012) (and cases cited therein) (holding that the prisoner failed to state a claim upon which relief may be granted to the extent that he claimed he had “a constitutional right to be free from false

accusations”). “A constitutional violation may occur, if as a result of an accusation, the Plaintiff was deprived of a liberty interest without due process.” *Reeves, supra*, 2012 WL 275166, at *2 (citing *Sandin v. Conner*, 515 U.S. 472, 485 (1995)). Plaintiff’s allegations are insufficient to trigger constitutional concerns in this case because he has not alleged any facts even remotely suggesting that the challenged disciplinary action deprived him of a protected liberty interest. As noted above, plaintiff alleges that the conduct report was withdrawn.

Plaintiff also fails to state a claim upon which relief may be granted to the extent that he claims Duckworth retaliated against him. A prisoner’s claim of retaliation for engaging in protected conduct is grounded in the First Amendment. *Jones v. Caruso*, 421 F. App’x 550, 553 (6th Cir. 2011) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999) (en banc)). A retaliation claim has three elements: (1) the prisoner engaged in protected conduct; (2) an adverse action was taken against the prisoner that ““would deter a [prisoner] of ordinary firmness from continuing to engage in that conduct””; and (3) the prisoner’s protected conduct, at least in part, motivated the adverse action. *Id.* (quoting *Thomas v. Eby*, 481 F.3d 434, 440 (6th Cir. 2007), in turn quoting *Thaddeus-X*, 175 F.3d at 394).

In this case, plaintiff’s allegations are insufficient to demonstrate that the alleged retaliatory acts were in response to protected conduct under the First Amendment. Plaintiff has only made conclusory allegations that he has “been going through serious retaliation” based on filing a prior lawsuit in this Court and—without any factual elaboration—that Duckworth retaliated against him. (*See Doc. 1, Complaint at PageID 3, 6*). Plaintiff has not alleged any facts to plausibly suggest that Duckworth was aware of or motivated by any protected conduct. “[C]onclusory allegations of retaliatory motive ‘unsupported by material facts will not be sufficient to state . . . a claim under § 1983.’” *Harbin v. Rutter*, 420 F.3d 571, 580 (6th Cir.

2005) (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538–39 (6th Cir. 1987)). “[N]ot every claim of retaliation by a disciplined prisoner, who either has had contact with, or has filed a lawsuit against prison officials, will state a cause of action for retaliatory treatment. Rather, the prisoner must allege a chronology of events from which retaliation may plausibly be inferred.” *Cain v. Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988) (citing *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. 1985) (noting that “alleging merely the ultimate fact of retaliation is insufficient”)). Without any “further factual enhancement” plaintiff’s conclusory allegations are simply insufficient to state an actionable claim for relief. *Twombly*, 550 at 555–57. *See also Whiteside v. Collins*, No. Civ.A. 2:08-cv-875, 2009 WL 4281443, at *9 (S.D. Ohio Nov. 24, 2009) (finding the plaintiff’s retaliation claim was subject to dismissal, noting that “conclusory allegations of retaliatory motive and temporal proximity alone are insufficient to establish his retaliation claim”) (Report and Recommendation), *adopted*, 2010 WL 1032424 (S.D. Ohio Mar. 17, 2010). Accordingly, defendant Duckworth should also be dismissed as defendants to this action.

Accordingly, in sum, plaintiff may proceed with his excessive force claim against defendant Dunlap. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b). However, plaintiff has failed to provide summons and U.S. Marshal forms for service. It is therefore **ORDERED** that plaintiff, **within thirty (30) days** of the date of this Order, submit a completed summons and U.S. Marshal form for service on defendant Dunlap. Once the Court receives the requested summons and United States Marshal forms, the Court will order service of process by the United States Marshal.

Having found that the remaining allegations in the complaint fail to state a claim upon which relief may be granted, plaintiff’s remaining claims should be dismissed.

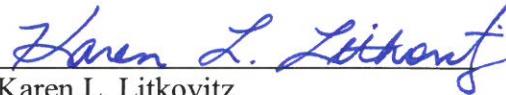
IT IS THEREFORE RECOMMENDED THAT:

The complaint be **DISMISSED** with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), with the exception of plaintiff's excessive force claim against defendant Dunlap.

IT IS THEREFORE ORDERED THAT:

Plaintiff, **within thirty (30) days** of the date of this Order, submit a completed summons and U.S. Marshal form for service on defendant Dunlap. Once the Court receives the requested summons and United States Marshal form, the Court will order service of process by the United States Marshal.

Date: 7/17/19


Karen L. Litkovitz
United States Magistrate Judge

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation (“R&R”) within **FOURTEEN (14) DAYS** after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within **FOURTEEN DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).